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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 580

WARNER BROS. PICTURES, INC. AND ALFRED A. KNOPF, INC.
Petitioners,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.; WILLIAM SPIER; THE WILDROOT COMPANY, INC.; REGIS RADIO CORPORATION, WILLIAM ROBERT TALLMAN, GILES B. DOUD, JOE EISINGER, BATTEN, BARTON, DURSTINE & OSBORN, INC., AND DASHIELL HAMMETT,
Respondents.

PETITION OF WARNER BROS. PICTURES, INC., AND ALFRED A. KNOPF, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Warner Bros. Pictures, Inc. and Alfred A. Knopf, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 9, 1954.

Opinions Below

The opinion of the United States District Court for the Southern District of California, Central Division (R. 74) is reported at 102 Fed. Supp. 141, 92 U.S.P.Q. 54, 28 Copyright Office Bulletin 499. The opinion of the Court of

Appeals for the Ninth Circuit (R. 531) is reported at 216 F. 2d 945, 104 U.S.P.Q. 103, and is printed in Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit, dated November 9, 1954 was entered on the same day. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Are the distinctive and original fictional characters who are portrayed in a published and copyrighted work of fiction included in and protected by the statutory copyright which protects such work of fiction?

2. If the author of a published and copyrighted novel (The Maltese Falcon) portraying distinctive and original fictional characters (Sam Spade), first grants *exclusive* motion picture, television and radio rights under copyright in the novel, can he subsequently grant motion picture, television and radio rights in the *identical characters* to third parties?

3. In such case, is the broadcasting by the third parties of a radio series portraying such characters an infringement of the rights in the copyright first granted by the author?

4. In such case, do these broadcasts unfairly compete with the rights in the copyright granted by the author?

Statutes Involved

The Copyright Act, Act of July 30, 1947, c. 391, 61 Stat. 652, 17 U.S.C. Sections 1(a), 1(b), 3 and 4.

Statement of Facts

The jurisdiction of the District Court was invoked under the Copyright Act (17 U.S.C.) and under 28 U.S.C. Section 1338.

Dashiel Hammett is the author of the copyrighted novel "The Maltese Falcon". This novel was published in book form by Alfred A. Knopf, Inc.[1] in 1930.

A few months later, by a written agreement (R. 37, hereinafter called "Hammett grant") Knopf and Hammett, who between them on that date owned *all* rights in the novel, granted to Warner Bros. Pictures, Inc., exclusive motion picture, dramatic (excepting "spoken stage"), radio and television rights in the novel (R. 38-42). The grant to Warner was under copyright.[2]

The leading character of "The Maltese Falcon" was the fictional detective Sam Spade. Sam Spade was new and original with Hammett, and made his first appearance in the novel (R. 100, 189). Hammett described Sam Spade as the "fictional, literary and dramatic character originated, conceived and created by me [Hammett] known as 'Sam Spade'" (R. 51). In the novel Spade was accompanied by other new and original characters, notably his secretary Effie Perrine and police lieutenant Dundy. These were not stock characters but were well-developed

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[1] Knopf is the holder of record of the copyright and is therefore a nominal party plaintiff and nominal petitioner herein.

[2] (i) Subdivision (f) of Article 2 warrants that the novel is "validly copyrighted * * * and that the Purchaser, under this grant, will have the exclusive right, by reason of the * * * copyrighted nature of said [novel] * * * to the motion picture rights therein, and all rights herein conveyed and granted to Purchaser" (R. 43).

(ii) In Article 7 Knopf and Hammett give Warner *the right to enforce and protect "under any and all copyrights,"* the rights given to Warner in the agreement (R. 46). (emphasis supplied)

(iii) Knopf, as record holder of the copyright, gave Warner for record purposes an "Assignment of Copyright" (R. 447).

and distinctive. In its analysis of the novel, the Court of Appeals said:

> "These characters are skillfully depicted in a running attractive style and distinctly assume individualism as distinguished from mere other persons." (Appendix B, *infra*, p. 29).

There is no issue in the instant case in this respect. These characters, and especially Sam Spade, are important parts of the novel.

Pursuant to the rights granted to it in the Hammett grant, Warner produced three motion pictures. The last of these was released in 1941 under the title "The Maltese Falcon", and was an outstanding success.

After the success of this Warner picture, Hammett granted by mesne assignments to certain of the respondents, including the Columbia Broadcasting System, the "sole and exclusive right to the use in the fields of radio, television, motion pictures and/or any other media of the entertainment industry", the "fictional, literary and dramatic character originated, conceived and created by me [Hammett] known as 'Sam Spade' " (R. 51). Later Hammett orally extended this grant to include the other characters from the novel (Appendix B, *infra*, p. 22).

Pursuant to this grant Columbia Broadcasting System broadcast for a number of years a radio series known as "The Adventures of Sam Spade". This series was broadcast weekly from 1946 to 1950 in some 180 half-hour episodes. A longer episode under the title "The Kandy Tooth" was presented a second time as part of another series called "Suspense" (Finding XXI, R. 108).

Each program was a separate episode in which Sam Spade solved a case. Each program also, with rare exceptions, included Effie Perrine and police lieutenant

Dundy. Occasionally still other characters from "The Maltese Falcon" were used and the novel was referred to by title. The announcer each week referred to Spade as "Dashiell Hammett's famous private detective" (Exs. 4a1-4c15). The Sam Spade of the radio was portrayed with the same characteristics as the Sam Spade of the novel and the same is true of the other characters.

There is no issue of fact in the present case that the characters contained in the novel (i.e., Sam Spade, Effie Perrine, Lieutenant Dundy, and some of the others mentioned by name), were the *identical characters* with the same characteristics as those used in the radio series, and that they were copied from the novel, and the court so found (R. 90).

The respondents, however, claimed that Hammett's prior grant to Warner of the exclusive motion picture, radio and television rights under copyright in the novel did not convey exclusive rights to use the characters. Respondents claimed that the characters appearing in the novel are not included in or protected by the copyright which protects the novel, and therefore Hammett's grant of rights in the novel to Warner under the copyright, did not give Warner exclusive rights in the characters. Consequently, they argued, Hammett was fully within his rights in authorizing the other respondents to use the characters in the radio series, and such use did not constitute infringement of Warner's rights in the copyright. Furthermore, they argued, since Hammett had these rights, the use of these characters in the radio series did not constitute unfair competition.

Warner, joining Knopf as nominal party plaintiff, instituted the instant action against Columbia Broadcasting System and the other respondents, who were an adver-

tising agency, a sponsor, producers and writers. Hammett was later joined as a defendant. The action was for copyright infringement and unfair competition, and an injunction and damages were sought. Warner contended that the use in the radio broadcasts of Sam Spade and the other characters copied from the novel constituted copyright infringement of its rights in the novel and also unfair competition.[3]

The District Court sustained the contentions of the respondents and the Court of Appeals affirmed. The court held that the characters contained in "The Maltese Falcon" were not protected by the copyright which protects the novel, and that the Hammett grant did not give Warner exclusive rights in Sam Spade and the other characters. Consequently, the court held Hammett was within his rights in granting the right to use the characters for broadcasting purposes, and thus the use of the characters was not copyright infringement, nor unfair competition. Judgment was entered dismissing the complaint.

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[3]During the pendency of the instant case in the District Court Hammett sought by Declaratory Judgment in the District Court for the Southern District of New York, a partial determination of the issues involved. His claim was rejected, both in the District Court 84 F. Supp. 28 (1949), and on appeal, 176 F. 2d 145 (CCA 2, 1949), the Second Circuit Court of Appeals stating that it could not decide the controversy in the absence of the other interested parties. In that connection the Second Circuit stated that "the legal questions raised by Hammett's complaint concern the scope of the protection accorded by the copyright assigned to the appellee [Warner]" 176 F. 2d 145, 149.

Hammett counterclaimed in the instant action for a declaratory judgment and was successful in the District Court. The Court of Appeals reversed, dismissing the counterclaim on the ground that it would serve no useful purpose since the judgment to be entered in accordance with its opinion would settle all the issues in the case.

REASONS FOR GRANTING THE WRIT

1. The decision below held that the Copyright Act does not protect characters.

(a) *The court's holding.*

The court lays the groundwork for its decision in the following language (Appendix B, *infra*, p. 21):

> "No question as to the legality of the copyright on The Maltese Falcon or to its continuing effectiveness through all times in suit, or to its complete beneficial ownership by Hammett and Knopf together, is in issue. Therefore, at the effective moment of the grants by Hammett and Knopf to Warner, the latter became possessed of the sole and exclusive right to the writing *which is within the copyright*, less all limiting terms of the grants."[4]

The court then devotes a part of its opinion to a discussion of general principles of contract interpretation. But the court also rests its decision squarely on its interpretation of the Copyright Act that "the writing which is within the copyright" does not include characters.

On this point the court says (Appendix B, *infra*, pp. 25, 26):

> "It will now be profitable to consider whether it was ever intended by the copyright statute that characters with their names should be under its protection. * * *
>
> "It is our conception of the area covered by the copyright statute that when a study of the two writings is made and it is plain from the study that one of them is not in fact the creation of the putative author, but instead has been copied in substantial part exactly or in transparent re-phrasing to produce essentially the story of the other writing, it infringes."

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[4] All emphasis herein is supplied.

> "It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright. * * *"
>
> "We conclude that even if the Owners assigned their complete rights in the copyright to The Falcon, such assignment did not prevent the author from using the characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles did not go with the sale of the story."

(b) *The court's error in interpreting the Copyright Act gave rise to its erroneous interpretation of the Hammett grant.*

Inherent in the court's interpretation of the Hammett grant was its mistaken conception of the Copyright Act. The court found the language of the Hammett grant to be ambiguous because rights in the characters were not specifically conveyed. Because of this "ambiguity" it admitted parol evidence as to the intention of the parties and engaged in an elaborate discussion of rules of contract interpretation.

But the Hammett grant is a clear grant to Warner of exclusive motion picture, radio, and television rights under copyright in "The Maltese Falcon," and the character Sam Spade is an important part of that work. Plot is not mentioned in the Hammett grant but no one would contend that such an essential part of the work is not covered by the grant. There was no more necessity for mentioning characters in the grant than there was for mentioning plot. If original and distinctive characters in a copyrighted novel are protected by the copyright as petitioner contends, there is no ambiguity in the Ham-

mett grant, and no basis for admitting parol evidence as to intention.[5]

2. The effect of the court's decision.

The most obvious effect of the court's decision is that the Copyright Act would not prevent the piracy of distinct and original characters in a copyrighted work. Any one could publish a detective story copying Sam Spade and the other characters from The Maltese Falcon but using them in different situations (capers), and Hammett and Knopf could not invoke the remedies of the Copyright Act to stop the publication.

The court ignores this disastrous result. But even if this result with respect to the Copyright Act is accepted, there remains the further difficulty,—If the characters in a published copyrighted novel are not protected by the copyright, are they protected in any other way? The Court of Appeals merely said that "even if the Owners assigned their complete rights in the copyright to The Falcon, such assignment did not prevent the author from using the characters used therein, in other stories" (Appendix B, *infra*, p. 26).

The District Court was bolder and stated that the characters in the published copyrighted novel are protected by common law (R. 86). We shall discuss the effect of the decision, first on the assumption that such charac-

[5]The Court of Appeals, as did the District Court, relied on a custom said to exist in the publishing field that an author who sold the exclusive right to publish his work in book form retained the right to re-use the characters portrayed therein. But there was no evidence that any such custom exists in the motion picture, radio or television fields. The book publisher obtains merely the right to print and vend the novel in the form in which it is written whereas the motion picture, radio and television industries, as well as the legitimate theatre, add to, subtract from and adapt the novel and, in short, use it as raw material for their own creative productions. Putnam, *Authors and Publishers* (New York 1897); *Dam* v. *Kirke La Shelle Co.*, 175 Fed. 902 (CCA 2, 1910). Obviously a custom applicable to one field would not apply to the other.

ters are protected at common law and then on the assumption that they are not.

If the characters of a published copyrighted novel are protected by common law, then Sam Spade belongs to Hammett and his heirs and assigns forever, and never falls into the public domain. If Sam Spade never goes into the public domain, then Tom Sawyer, Mr. Pickwick, D'Artagnan, Jean Valjean and other classical characters too numerous to mention, belong in perpetuity to the heirs or assigns of their respective creators.

But the law is clear that the characters of a published novel are not protected by common law. When a work of fiction is published, all of it which is not protected by the Copyright Act goes into the public domain. *Wheaton* v. *Peters*, 8 Pet. 591 (U. S., 1834); *Holmes* v. *Hurst*, 174 U. S. 82 (1899); *Bobbs-Merrill* v. *Straus*, 210 U. S. 339 (1908).

In *Kurlan* v. *C.B.S.*, 40 Cal. 2d 799, 256 P. 2d 962 (1953), the court stated that after publication the "My Sister Eileen" characters are not protected by the common law.

Consequently, when "The Maltese Falcon" was published in 1930, under the court's decision that the characters are not protected by copyright, Hammett would have lost all rights in Sam Spade. Such a result would cut the heart out of the copyright statute. There would be no other remedy to the author because it is settled law that if a work is not protected by copyright its appropriation does not constitute unfair competition. *Atlas* v. *Street & Smith* ("Nick Carter"), 204 Fed. 398 (CCA 8, 1913), cert. den. 231 U. S. 755 (1913); *National Comics* v. *Fawcett* ("Superman"), 191 F.2d 594 (CCA 2, 1951); *Archie*

Comics v. *American News Co.* ("Archie"), 125 N. Y. S. 2d 919 (1953), affirmed 129 N. Y. S. 2d 915 (1954).

3. The holding of the Ninth Circuit conflicts with holdings of the Second Circuit.

In *Nichols* v. *Universal*, 45 F.2d 119 (CCA 2, 1930), the Second Circuit held that where the characters are "stock figures", like "the low comedy Jew and Irishman" in the stage play "Abie's Irish Rose", they are not protected by the copyright of the play. But in his opinion in that case, Chief Judge Learned Hand clearly indicated that if the characters were original and well-developed they would be protected by copyright, using as examples, Sir Toby Belch and Malvolio from *Twelfth Night*.

The problem was squarely presented to the Second Circuit in *Detective Comics* v. *Bruns*, 111 F.2d 432 (CCA 2, 1940). There the court held that the comic strip character "Superman" was protected by copyright. The court applied the principles underlying the *Nichols* case, drawing no distinction between comic strip and literary characters in determining whether they are sufficiently original and distinct to be protected. In sustaining a decree enjoining infringement, C.J. Augustus Hand said, at 433:

> "Defendants attempt to avoid the copyright by the old argument that various attributes of 'Superman' find prototypes or analogues among the heroes of literature and mythology. But if the author of 'Superman' has portrayed a comic Hercules, yet if his production involves more than the presentation of a general type he may copyright it and say of it: 'A poor thing but mine own'. * * * So far as the pictorial representations and verbal descriptions of 'Superman' are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the

author, they are proper subjects of copyright and susceptible of infringement because of the monopoly afforded by the act."

A like holding was made by the same court in *King Features Syndicate* v. *Fleischer,* 299 Fed. 533 (CCA 2, 1924), which held that the manufacture and sale of a toy comic racehorse called "Sparkplug" infringed the copyright of a book of cartoons containing pictorial illustrations of the horse. To the same effect, as to "Betty Boop", is *Fleischer* v. *Freundlich,* 73 F.2d 276 (CCA 2, 1934), cert. den. 294 U. S. 717 (1935), and, as to "Mutt and Jeff", is *Hill* v. *Whalen & Martell,* 220 Fed. 359 (S.D.N.Y., 1914).

The record in the instant case makes it clear that Sam Spade, Effie Perrine and Lieutenant Dundy are not "stock" or "general type" figures but are original, well-developed and distinctive. Without doubt the Second Circuit would hold that those characters are protected by the copyright of the novel "The Maltese Falcon."

4. The holdings of the Second Circuit are correct and the Ninth Circuit is in error.

Analysis of the Copyright Act[6] supports the Second

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[6] The first copyright statutes gave the author but one right, namely that after he wrote his work and published it, he retained the exclusive right to publish it as it was written and published. He could not prevent any other use of the work, such as dramatizing, using individual scenes, translating, abridging, etc. But by successive steps, the author was given the following exclusive rights in his published work of fiction:

First: To *perform* his work if it was a dramatic work (Act of 1856, c. 169, 11 Stat. 138).

Second: To *use individual scenes* from his work apart from the whole. *Daly* v. *Palmer,* Fed. Cas. No. 3552 (C.C., S.D.N.Y., 1868).

Third: To *make dramatizations* (Act of 1870, c. 230, 16 Stat. 212).

Fourth: To *make translations* (Act of 1870, c. 230, 16 Stat. 212).

Fifth: To *make abridgements or digests* (Act of 1909, c. 320, 35 Stat. 1075—see *Amdur on Copyright,* pp. 762 and 764).

Circuit's position that the original and distinctive characters of a copyrighted work of fiction are protected by the copyright.

(a) Section 1(a) grants to the author or proprietor of a work the exclusive right to "copy" it. That Section has been held to prohibit the unauthorized copying of any substantial portion of a work, such as copying a scene in *Daly* v. *Palmer*, Fed. Cas. No. 3552 (C.C., S.D.N.Y., 1868), or the dramatic sequence or plot in *Sheldon* v. *M-G-M*, 81 F.2d 49 (CCA 2, 1936).

(b) Section 1(b) gives the author or proprietor of a work the exclusive right to make "other versions". The use of characters in new situations has been held to be the making of "other versions". *National Comics* v. *Fawcett*, 191 F.2d 594 (CCA 2, 1951).

(c) Section 1(b) also gives the author or proprietor of a work the exclusive right to "dramatize". The use of characters in new dramatic situations has been held to

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Sixth: To *use the plot and dramatic sequence* in other works. *Dam* v. *Kirke La Shelle Co.*, 175 Fed. 902 (CCA 2, 1910); *Sheldon* v. *M-G-M*, 81 F. 2d 49 (CCA 2, 1936).

Seventh: To *use original and distinctive characters* from the work in other works. *Nichols* v. *Universal*, 45 F. 2d 119 (CCA 2, 1930); *Detective Comics* v. *Bruns*, 111 F. 2d 432 (CCA 2, 1940).

This development has culminated, as shown in Seventh above, in affording to the author the protection of the copyright statute in the exclusive use of the original and distinctive characters which he creates, a right which the instant case would take away from him.

The court below based its decision in part on the failure of the Copyright Act to mention "characters" as being specifically protected, but from the very beginning the Copyright Acts have been drawn with language protecting the work against *uses*, and have not specified the *parts* of the work which are protected. Under the court's reasoning, since there is no mention in the Acts of plot, dialogue, incidents or scenes, these parts of the work would not be protected.

invade the rights of the proprietor of dramatic rights. *Hill* v. *Whalen & Martell,* 220 Fed. 359 (S.D.N.Y., 1914).

(d) Section 3 expressly protects component parts of a work. Characters have been held to be "component parts" within the meaning of the statute. *King Features* v. *Fleischer,* 299 Fed. 533 (CCA 2, 1924).

In sum, original and distinctive characters of a copyrighted work of fiction are protected by the Copyright Act.

5. Unfair competition.

If the Second Circuit is correct in holding that original and distinctive characters are protected by the Copyright Act, then Warner acquired exclusive rights to use Sam Spade for motion pictures, radio and television, and the Ninth Circuit was in error in holding that the radio broadcasts, "Adventures of Sam Spade", did not unfairly compete with Warner's rights. *Patten* v. *Superior Talking Pictures,* 8 Fed. Supp. 196 (S.D.N.Y., 1934).

Further, since the Hammett grant gave Warner exclusive motion picture, radio and television rights in the novel, Warner is entitled to prevent any competing use of those rights authorized by Hammett. *Manners* v. *Morosco,* 252 U. S. 317 (1920).

CONCLUSION

The issue in this case involves an important question of copyright law. The decision of the court below is the only reported case holding that original and distinctive characters in a published copyrighted work are not protected by the copyright. This holding conflicts with the holdings of the Second Circuit. The question is one which has not been, but which should be settled by this Court.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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